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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 530

ARTIGAS BATTLE ROBERTO MACHADO, PETITIONER

v.

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 7–11) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 23, 1951 (R. 6). The petition for a writ of certiorari was filed on January 11, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in view of the fact that the Court of Appeals remanded the cause for determination

of the issue of mistake, review of other questions is warranted at this interlocutory stage.

2. Whether the selective service authorities could validly treat as a resident alien subject to military service an alien who failed to apply for a determination of his residence within three months after entry.

3. Whether the subsequent cobelligerency of Uruguay and petitioner's subsequent submission to induction relieved petitioner from the bar to citizenship.

4. Whether the bar to citizenship under Section 3 (a) of the Selective Training and Service Act of 1940 terminated with the expiration of that Act.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra*, pp. 16–22.

STATEMENT

Petitioner filed a complaint in the United States District Court for the District of Columbia in which he alleged, in substance, the following facts (R. 1–4):

Petitioner is a native and citizen of Uruguay, and was admitted to the United States on March 14, 1944, as a business visitor for a period of one year. This status was recognized and extended by the Immigration and Naturalization Service until December 31, 1945. (R. 1.) On June 12,

1944, he registered under the Selective Training and Service Act of 1940 (R. 1). After being classified 1-A, he went to his local draft board and advised its clerk that it was his intention to return to Uruguay (R. 2). The clerk advised him to execute D. S. S. Form 301, which was an application for relief from military service as a national of a neutral country[1] (R. 2). The form was prepared by his local draft board, presum-

[1] D. S. S. Form 301 at that time read as follows:

Date received _____, 194--

Application by Alien for Relief from Military Service

COUNTY OF _____,

State of _____, *ss:*

I, _____ _____ _____
(First name) (Middle name) (Surname)
do solemnly swear—affirm—that I reside at _____,
(City)
_____, _____; that I am registered with
(County) (State)
Local Board _____, _____, _____, _____;
(Number) (City) (County) (State)
that my order number is _____ and serial number is _____; and that I am a citizen or subject of _____, which is neutral in the present war.
(Country)

My alien registration number is _____.

I do hereby make application to be relieved from liability for training and service in the land or naval forces of the United States, under the Selective Training and Service Act of 1940, as amended, in accordance with the act of Congress, approved December 20, 1941. I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States. I _____
(have) or (have not)
filed a declaration of intention to become a citizen of the United States.

ably by this same clerk, but was not explained to petitioner, he being unable "to fully understand the nature of said form" or to "read or write the English language with full comprehension" (R. 2). When petitioner signed the form, "he was under the impression that he was claiming exemption on the ground that he was a non-resident alien and not on the ground of neutral alienage" (R. 2). Subsequent to the execution of the form, petitioner's classification was changed from 1–A to 4–A (R. 1).

On September 14, 1944, appellant married a native born American citizen, and having "decided to become a permanent resident of the United States," he requested from his draft board permission to withdraw his claim of exemption so that he might enter the United States Army (R. 2). This request was denied (R. 2). On February 22, 1945, Uruguay changed from a neutral to a cobelligerent, after which petitioner was again classified 1–A (R. 2). On May 11, 1945, he was rejected as physically unfit and reclassified 4–F (R. 2).

The Commissioner of Immigration and Naturalization, after refusing to extend petitioner's admission to the United States as a business visitor beyond December 31, 1945, issued a deportation warrant against petitioner on January 22, 1947, on the ground that he had remained in the United States longer than permitted by law (R. 2–3). After a hearing under this warrant

on October 6, 1947, the immigration inspector found *inter alia* that petitioner was (1) barred from becoming an American citizen because of the provisions of Section 3 (a) of the Selective Training and Service Act of 1940; and (2) inadmissible for permanent residence in the United States by reason of being thus barred from citizenship (R. 3), and recommended that he be permitted to depart from the United States voluntarily. These findings and recommendations were approved by respondents, or their predecessors in office, who entered an order requiring petitioner to leave the United States within 60 days (R. 3).

Petitioner seeks a judgment under the Declaratory Judgment Act (28 U. S. C. 400), and the Administrative Procedure Act (5 U. S. C. 1001, *et seq.*) declaring, *inter alia,* (1) that he is not bound by D. S. S. Form 351, "because [it] was vitiated by mistake," and he was not at the time of its execution "residing within the United States" within the meaning of the Selective Training and Service Act of 1940; and (2) that he is not barred from citizenship, is admissible to the United States for permanent residence, and eligible for suspension of deportation or preexamination (R. 4).

On respondent's motion, the District Court on June 24, 1949, entered an order dismissing the complaint on the grounds that the court had no jurisdiction of the subject matter under the De-

claratory Judgment Act[2] or the Administrative Procedure Act, and that the complaint failed to state a cause of action on which relief could be granted (R. 4–5). On November 23, 1951, the Court of Appeals reversed and remanded the cause on the ground that the complaint sufficiently alleged a cause of action based on mistake so that the petitioner was entitled to a responsive pleading on that issue (R. 6, 7–11). In addition, it held (a) that the petitioner was "residing in the United States" at the time he executed his claim of exemption and (b) that neither the entry by Uruguay into the war as a cobelligerent nor the expiration of the Selective Training and Service Act of 1940, relieved petitioner from the bar to citizenship resulting from execution of the form.

ARGUMENT

1. Since the judgment of the Court of Appeals was not a final judgment, but one remanding the case to the District Court for further proceedings on the issue of mistake under the rule of *Moser* v. *United States,* 341 U. S. 41, there is no reason for this Court to consider the questions raised by the petition for certiorari at this time. If the petitioner should succeed on that issue, the other questions will become moot. If he does not, his right to petition for certiorari at a later time will not be prejudiced by its denial now.

[2] This conclusion has since been overruled by *McGrath* v. *Kristensen*, 340 U. S. 162, decided December 11, 1950.

Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (Wolfson and Kurland ed., 1951), sec. 130, pp. 233–234; *Simmons Co.* v. *Grier Bros. Co.*, 258 U. S. 82, 91.

It is true that this Court has granted petitions to review non-final judgments. But it normally does so only when the issue raised is of "peculiar gravity and general importance" (*Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U. S. 251, 258); or "to prevent extraordinary inconvenience and embarrassment in the conduct of the cause" (*American Construction Co.* v. *Jacksonville, T. & K. W. Railway Co.*, 148 U. S. 372, 384); or, at times, where the issue raised challenges the power of the Court even to hear the case (cf. *Land* v. *Dollar*, 330 U. S. 731, 734; *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 685, n. 3; *Johnson* v. *Eisentrager*, 339 U. S. 763). In this case, determination of the mistake issue is clearly within the province of the District Court, and its determination by that court will not cause serious inconvenience to petitioner nor embarrass any policy of the Government.

2. Moreover, the court below was correct in holding that petitioner was subject to military service at the time he signed the claim of exemption. The selective service regulations clearly required this result, in that petitioner had failed for more than three months after entry to file

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an Alien's Application for Determination of Residence. (See 32 C. F. R. (1943 Supp.) 611.12, 611.13, Appendix, *infra*, pp. 18–21.) Petitioner, not challenging their applicability, urges that the regulations are invalid in that they treat as a resident one who clearly may not be such under the statute. The short answer, however, is that the petitioner was not a person so clearly exempt from military service that he could not be held to the burden of promptly initiating a determination of his ~~ineligibility~~ residence, as the alternative to being treated automatically as a resident.

Section 3 (a) of the Selective Training and Service Act made eligible for military service every "male person residing in the United States." The phrase "residing in" is obviously not one capable of mechanical definition by some simple formula; precise definition was left for administrative regulations. *McGrath* v. *Kristensen*, 340 U. S. 162, 173, 175; see *United States* v. *Rubinstein*, 166 F. 2d 249, 254 (C. A. 2), certiorari denied, 333 U. S. 868. Even the regulations, however, did not undertake to define in detail all possible factors to be considered in determining residence for the purposes of military service. As to persons not clearly in an immune status, such as diplomatic officials, it made a preliminary separation, treating those in the country less than three months after May 16, 1942, as nonresidents, and

leaving the classification of those here for more than three months after that date for determination on a case to case basis.[3] All that the attacked regulation required was that an alien, within three months after entry, indicate to the Selective Service officials that he claimed the status of a nonresident. If he did not do so, he was to be deemed to have acquiesced in being treated as a resident alien; if he did make such a claim, his case would be determined on its individual facts.

There is nothing unreasonable about such a regulation, on its face or as applied to petitioner. The wide divergence in the status of aliens in this country and the need for rapid classification of men made it reasonable to cast upon an alien, in this country for some period of time, the duty of taking some affirmative step to assert his claim of nonresidence. Petitioner was permitted to be in this country for a year with the possibility of having his residence extended much longer (8 C. F. R. (1938) 3.29) and of having his status changed (8 C. F. R. (1938) 3.31 (see Appendix, *infra*)).[4] Under the circumstances, he was not so clearly ineligible for military service that he

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[3] The *Kristensen* case on which petitioner relies is inapplicable since Kristensen signed the form claiming exemption before the regulation here involved became effective. 340 U. S. at pp. 174–175.

[4] His status is unlike that of *Kristensen* who was forced to remain here by wartime conditions, 340 U. S. at pp. 175–176.

could not properly be held to the duty of at least asserting a claim to be treated as a nonresident.[5]

The pattern of requiring affirmative action to claim a particular status is not an unusual one. Thus citizens claiming to be exempt from military service as conscientious objectors must make timely assertion of their claim. (Cf. 32 C. F. R. (1941 Supp.) 623.2, 32 C. F. R. (1940 Supp.) 603.371.) Important constitutional rights, such as the privilege against self-incrimination, are waived if not promptly asserted, *Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103, 113. The present situation is analogous to the rule

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[5] It should be noted that Section 2 of the Act as it was passed in 1940 provided that "every male citizen of the United States * * * and every male alien residing in the United States" was subject to registration; and Section 3 (a) at that time provided that "every male citizen * * * and every male alien residing in the United States who has declared his intention to become such a citizen" should be liable to service. 54 Stat. 885. During 1940, the Attorney General rendered an opinion to the effect that the words of Section 2 defining those subject to registration included "every alien * * * who lives or has a place of residence or abode in the United States, temporary or otherwise, or for whatever purpose taken or established * * *." 39 Op. Atty. Gen. 504, 505. In 1941, the sections were amended to impose liability for registration and service on "every male citizen * * * and every other male person residing in the United States." 55 Stat. 844, 845. Although the then Attorney General has subsequently concluded that his 1940 opinion was erroneous, *McGrath* v. *Kristensen, supra,* at p. 176, the fact remains that this view was outstanding at the time of the passage of the 1941 legislation.

that "one who is required to take out a license will not be heard to complain, in advance of application, that there is danger of refusal." *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 616–617.

3. The subsequent cobelligerency of Uruguay and petitioner's resultant submission to induction did not remove the statutory bar to citizenship. The statute provides that a resident neutral alien who requests exemption "shall thereafter be debarred from becoming a citizen of the United States." Under the Selective Training and Service Act, no neutral alien could be forced to serve, but, at the time he requested exemption he was free to choose—he could enlist in the defense of the United States, or he could claim exemption and renounce any possibility of becoming an American citizen. After Uruguay had entered the war, petitioner was no longer free to choose. He was liable to service if he returned to Uruguay, and, as a citizen of a cobelligerent, he could be forced into the service of this country. It does not follow that the consequences of a deliberate choice should be nullified by a subsequent change of circumstances. Nothing in the statute indicates any such intention, and the reported decisions which have dealt with the problem are in accord with the view of the court below. *Petition of Fatoullah*, 76 F. Supp. 499

(E. D. N. Y.); *In re Martinez*, 73 F. Supp. 101 (W. D. Pa.).*

4. The statutory bar was not removed by the subsequent expiration of the Selective Training and Service Act. Without more, the language of the Act is enough to dispose of petitioner's contention in this regard. It provided that neutral aliens who claimed exemption from military service "shall thereafter be debarred from becoming a citizen of the United States." In view of the purposes of the Selective Training and Service Act and of the bar, it is inconceivable that Congress intended the disqualification from citizenship to endure only for the period of hostilities.

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* The cases relied upon by petitioner are inapposite. A different question is involved where an alien who has claimed exemption is actually inducted and claims the benefits conferred by 8 U. S. C. 724, on aliens actually serving with the armed forces. *Matter of Ali Ipar* (V. P. File No. 391915). In *Petition of Ajlouny*, 77 F. Supp. 327 (E. D. Mich.) the claim for exemption was ineffective because Palestine of which Ajlouny was a citizen was not a neutral country. The other cases relied on arose out of World War I where only a withdrawal of a declaration of intention operated to bar citizenship. The cases relied on by petitioner are authority only for the proposition that the claim of exemption (without the need for withdrawing a declaration) would not prevent the running of a new five-year period showing attachment to the Constitution following the end of the war. See *In re Bevelacqua*, 295 Fed. 862 (D. Mass.); *In re Siem*, 284 Fed. 868 (D. Mont.); *In re Gustavson*, 300 Fed. 251 (S. D. Cal.).

Bars to citizenship have appeared consistently in the selective service legislation of 1917, 1940, and 1948.[7] This consistent legislative policy to deny citizenship to neutral aliens who claim exemption from military service itself indicates that Congress intended such bars to be permanent except where it affirmatively acts to end the bar. Indeed, the history of Section 2 of the 1917 Act shows that the language of permanent debarment was added after language was considered which made the debarment operative only during the period of the war. See 56 Cong. Rec. 8417, 8485, for original language.[8]

In the immigration acts, Congress has recognized the continuing nature of the disability arising from the neutral alien's claim of disability. In Section 28 (c) of the Immigration Act of 1924, 43 Stat. 153, 168, 8 U. S. C. 224 (c), Congress defined the phrase "ineligible to citizenship" for the purpose of that statute as including

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[7] Section 2 of the Selective Draft Act of 1917, as amended, 40 Stat. 76, 884; Section 3 (a) of the Selective Training and Service Act of 1940, as amended, 54 Stat. 855, 55 Stat. 844; and Section 4 (a) of the Selective Service Act of 1948, 62 Stat. 604, 50 U. S. C. App. (Supp. IV) 454.

[8] It is true that the 1917 provision imposed debarment only on those who withdrew declarations of intention to become citizens, but this does not answer the argument that the debarment could outlast the act. There were no provisions for debarment of those who had not filed declarations, although claims of such persons exposed them to challenge that they were not attached to principles of Constitution. See *In re Bevelacqua*, *supra*, and *In re Gustavson*, *supra*.

any alien ineligible for citizenship under Section 2 of the Selective Draft Act of 1917, as amended.[9] And in 1945, Congress acted consistently with this interpretation by changing Section 28 (c) in two ways: (1) it recognized the repeal in 1940 of the debarment of 1917 by dropping the reference to ineligibility arising from the 1917 act; and (2) it included ineligibility caused by operation of Section 3 (a) of the Selective Training and Service Act of 1940. 59 Stat. 551. Congress has thus clearly indicated that the bar was intended to outlive the act. *Benzian* v. *Godwin*, 168 F. 2d 952 (C. A. 2), certiorari denied, 335 U. S. 886.

Finally, it should be noted that Section 109 of Title I of the United States Code (Supp. IV) operates to preserve petitioner's liability under the exemption. That section provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of any penalty, forfeiture, or liability. The expiration of any temporary statute shall not have the effect to release

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[9] Under Section 13 (c) of the Immigration Act of 1924, 8 U. S. C. 213 (c), such aliens were excluded from the United States.

> or extinguish any penalty, forfeiture, or liability incurred under such statute, *unless the temporary statute shall so expressly provide,* and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. [Emphasis added.]

This general savings clause must be read into all repealing statutes, *Hertz* v. *Woodman,* 218 U. S. 205, 218; *Great Northern Ry. Co.* v. *United States,* 208 U. S. 452, 465, with the consequence of continuing petitioner's disability.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
BEATRICE ROSENBERG,
JOHN R. WILKINS,
Attorneys.

FEBRUARY 1952.

APPENDIX

Selective Training and Service Act of 1940, 54 Stat. 885, as amended, 55 Stat. 844:

SEC. 3 (a) [50 U. S. C. App. 303 (a)]. Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States * * * shall be liable for training and service in the land or naval forces of the United States. *Provided,* That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction * * * he has made application to be relieved from such liability in the manner prescribed by and in accordance with the rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States * * *.

SEC. 5 (a) [50 U. S. C. App. 305 (a)]. Commissioned officers, warrant officers, pay clerks, and enlisted men of the Regular Army * * * and diplomatic representatives, technical attachés of foreign embassies and legations, consuls general, consuls, vice consuls, and consular agents of foreign countries, and persons in other categories to be specified by the President, residing in the United States, who are not citizens of the United States, and who have not declared their intention to become citizens of the United States, shall not be required to be registered under section 2 and shall be relieved from liability for

training and service under section 3 (b).

SEC. 10 [50 U. S. C. App 310].

(a) The President is authorized—

(1) to prescribe the necessary rules and regulations to carry out the provisions of this Act;

(2) to create and establish a Selective Service System, and shall provide for the classification of registrants and of persons who volunteer for induction under this Act on the basis of availability for training and service, and shall establish within the Selective Service System civilian local boards and such other civilian agencies, including appeal boards and agencies of appeal, as may be necessary to carry out the provisions of this Act. * * *

Immigration Act of 1924, as amended (43 Stat. 153, 54 Stat. 711):

SEC. 3 [8 U. S. C. 203]. When used in this Act the term "immigrant" means any alien departing from any place outside the United States destined for the United States, except (1) an accredited official of a foreign government recognized by the Government of the United States, his family, attendants, servants, and employees, (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure, (3) as alien in continuous transit through the United States * * *.

* * * * * *

SEC. 15 [8 U. S. C. 215]. The admission to the United States of an alien excepted from the class of immigrants by clauses (1), (2), (3), (4), (5), or (6) of section 3 * * * shall be for such time and under such conditions as may be by regulations prescribed (including, when deemed necessary for the classes mentioned in

clause (2), (3), (4), or (6) of section 3 * * * the giving of bond with sufficient surety, in such sum and containing such conditions as may be by regulations prescribed) to insure that, at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States * * *.

* * * * *

SEC. 28 (c) [8 U. S. C. 224 (e)]. The term "ineligible to citizenship," when used in reference to any individual, includes an individual who is debarred from becoming a citizen of the United States under * * * section 2 of the Act * * * approved May 18, 1917, as amended, or under law amendatory of, supplementary to, or in substitution for, any of such sections; * * *.

32 Code of Federal Regulations (effective February 7, 1942, 7 Fed. Reg. 855, and during 1944):

SEC. 611.12. *When a nondeclarant alien is residing in the United States.* Every male alien who is now in or hereafter enters the United States who has not declared his intention to become a citizen of the United States, unless he is in one of the categories specifically excepted by the provisions of § 611.13, is a male "person residing in the United States" within the meaning of section 2 and section 3 of the Selective Training and Service Act of 1940, as amended.

Sec. 611.13 [1943 Supp.]. *When a nondeclarant alien is not residing in the United States.* (a) A male alien who is now in or hereafter enters the United States who has not declared his intention to become a citizen of the United States is not "a male person residing in the United States" within the meaning of section 2 or section

3 of the Selective Training and Service Act of 1940, as amended; provided he has in his personal possession an official document issued pursuant to authorization of or described by the Director of Selective Service which identifies him as a person not required to present himself for and submit to registration and provided:

(1) He is a diplomatic representative, a technical attaché of a foreign embassy or legation, a consul general, a consul, a vice consul, or a consular agent of a foreign country; or

(2) He is an employee of a foreign embassy, legation, or consulate and a national of the country employing him who has been notified to the Department of State; or

(3) He is a full-time official or employee of a foreign government and a national of the country employing him, who has been notified to the Department of State; provided that at the time he is notified to the Department of State, a proper representative of his government advises and after investigation the Department of State and the Director of Selective Service agree that he is in fact not residing in the United States; or

(4) He is a dependent male child of any person described in subparagraph (1), (2), or (3) of this paragraph; or

(5) He is a member and in the active service of the armed forces of a cobelligerent or a neutral country; or

(6) He has entered or hereafter enters the United States in a manner prescribed by its laws and does not remain in the United States after May 16, 1942, or for more than 3 months following the date of his entry, whichever is the later; or

(7) He has, within the time prescribed

and in the manner provided in § 611.21, filed with the local board with which he is registered, or if he is not registered, with the local board having jurisdiction over the area in which he is located, an Alien's Application for Determination of Residence (Form 302), together with an Alien's Personal History and Statement (Form 304), and such application is either pending or has resulted in the issuance by the local board of an Alien's Certificate of Nonresidence (Form 303) which has not expired; or

(8) He is an individual designated by the Director of Selective Service as not required to present himself for and submit to registration; or

(9) He is within a group of individuals described by the Director of Selective Service as not required to present themselves for and submit to registration.

Sec. 611.21 [8 F. R. 1346]. *What aliens may apply for a determination.* Any nondeclarant alien who has entered or who hereafter enters the United States * * * may file with his local board * * * an Alien's Application for Determination of Residence (Form 302): *Provided,* That such application is filed within three months after the date of his entry into the United States or within three months after persons of his age become liable for training and service by law, whichever is the later: *And provided further,* That such application is filed prior to induction. * * *

8 Code Federal Regulations (1st ed. 1938):

SEC. 3.27. * * * The term "status" as used in the Immigration Act of 1924 means the condition of carrying on one of the particular limited activities for which an alien may be admitted under a subdivision of

section 3 of that Act * * *. When applied to an alien * * * the term "visitor's status" means that he is admissible under section 3 (2) and is an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure * * *.

SEC. 3.28. * * * When an alien claims to have an official status, or a visitor's status, * * * an examining officer may temporarily admit him if satisfied beyond a doubt that the alien has the specific status claimed. * * *

SEC. 3.29. * * * The admission of the aliens described by § 3.28 * * * shall be for a reasonable fixed period not exceeding one year, and on condition that the alien shall maintain during his temporary stay in the United States the specific status claimed, and shall voluntarily depart therefrom at the expiration of the time fixed or upon failure to maintain the specific status under which admitted.

* * * * *

SEC. 3.31. * * * After an alien has gained admission by claiming a visitor's status, * * * he cannot change from the specific status under which he was admitted, unless because of the peculiar circumstances of the case, the Secretary of Labor authorizes such change. In meritorious cases where the Secretary of Labor does authorize such change, he may * * * exact, as a condition of the change, a bond in such sum and with such provisions as he deems appropriate to insure that the alien shall voluntarily depart from the United States at the expiration of a time fixed by the Secretary of Labor or upon his failure to maintain the specific new status acquired, whichever shall happen sooner.

U. S. GOVERNMENT PRINTING OFFICE: 1952